No. 74-773

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In the Supreme Court of the United States

OCTOBER TERM, 1974

SCOTT HUDGENS, PETITIONER

v.

NATIONAL LABOR IRELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (A. 1-15)[1] is reported at 501 F.2d 161. The Board's supplemental decision and order (A. 17-20) are reported at 205 NLRB No. 104. The Board's original decision and order (A. 33-40) are reported at 192 NLRB 671.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1974 (A. 16). The petition for a writ of certiorari was filed on December 21, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

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[1] "A." references are to the petitioner's appendix. "J.A." references are to the joint appendix filed in the court of appeals.

QUESTION PRESENTED

Whether the Board reached a proper accommodation between property rights and employee rights by concluding that in the circumstances of this case the owner of a large shopping center violated the National Labor Relations Act by prohibiting warehouse employees, who are engaged in a lawful strike against their employer, from seeking support for that strike by picketing the entrances to a retail store in that center leased by the employer.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth at pp. 2-3 of the petition. The following portion of the Act is also relevant:

> Section 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

STATEMENT

Petitioner Hudgens owns and operates the North DeKalb Shopping Center in DeKalb County, Georgia (J.A. 10, 49-50).[2] The shopping center, which covers approximately 55 acres of land, consists of a large central structure housing 60 stores and a parking lot surrounding it that can accommodate 2,640 automobiles (J.A. 10, 50-51, 89, 154). There are four customer entrances from the parking lot into the shopping center building, through which 85 to 90 percent of all customers enter (J.A. 43, 50-51, 155). Several of the stores have entrances fronting on the parking

[2]It is undisputed that Hudgens is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act (J.A. 43, 49-50, 79, 81-82).

lot but most of the stores are accessible only from aisles, which are 30 to 40 feet wide and intersect, forming an extensive enclosed mall within the shopping center building (J.A. 43-44, 50-51, 89, 158). The mall contains planters, benches, fountains, pools, restrooms, and drinking fountains (J.A. 164-165). In addition, it contains a "charity booth" and an auditorium available for the use of approved groups (J.A. 101-102, 157, 167, 173-177, 179). The stores are leased from Hudgens, the lease granting the "lessee, its employees, agents, customers and invitees the non-exclusive right to use the parking and other common areas" in the shopping center (J.A. 92-93).

The shopping center property is located on the corner where the Lawrenceville Highway, a four-lane road, and North Druid Hills Road intersect (J.A. 43, 55). There are five entrances leading into the parking lot from these roads (J.A. 43, 51, 155, 189-190). The shopping center building is approximately 500 feet from these entrances (J.A. 10, 143, 151). About 45,000 people from the greater Atlanta area visit the mall each week (J.A. 15, 191).

The warehouse employees of Butler Shoe Company ("Butler") are represented by Local 135, Retail, Wholesale and Department Store Union, AFL-CIO (the "Union") (J.A. 12, 43-44, 129, 140). In January 1971, the warehouse employees went on strike for a new contract (J.A. 12, 44, 129, 132, 134). In order to gain support for their contract demands, the warehouse employees decided to picket not only Butler's warehouse, but also all of its retail stores in the Atlanta area, including the store in the enclosed mall at the North DeKalb Shopping Center (J.A. 12, 44, 129-130, 134, 146).

Accordingly, on the morning of January 22, 1971, four warehouse employees entered the enclosed mall[3] with placards reading, "Butler Shoe Warehouse on Strike, AFL-CIO, Local 315" (J.A. 44, 51, 150). Before the Butler store opened, the four employees sat on a bench near an entrance to the store (J.A. 44, 51, 150). Douglas Ballard, the general manager of Hudgens' shopping center,[4] noticed the seated employees and told them that they could not picket in the mall or in the parking lot because these areas were private property (J.A. 44, 51, 130, 142, 150). Ballard also told the employees that they would have to picket on the Lawrenceville Highway or on North Druid Hills Road and that, if they did not leave, they would be arrested (J.A. 13, 57-58, 59, 131, 150). The employees left the mall but returned a short time later and began picketing in the immediate area of the mall adjacent to Butler's store (J.A. 44, 51, 54, 150). The store, which is located where two aisles of the mall intersect, has display windows and an entrance on each of these aisles (J.A. 54, 137, 159). Two pickets walked in parallel lines in each aisle, close to the side of the store (J.A. 54, 137-138).

The picketing was peaceful and continued for about 30 minutes (J.A. 44, 51, 150). At approximately 11:30 a.m., Ballard telephoned the shopping center and had one of the employee-pickets called to a nearby phone (J.A. 44, 51, 57). Ballard warned that, if the picketing did not stop in thirty minutes, he would have the police at the center to lock up the pickets (J.A. 10, 44, 57-58). Shortly thereafter, Hudgens' attorney told the Union's attorney that picketing was not permitted within the enclosed mall and that, if the pickets did not leave, Hudgens would telephone the

[3]The Butler store can be entered only from the enclosed mall (J.A. 44).

[4]Concededly, Ballard was acting as Hudgens' agent (J.A. 50).

DeKalb County Police Department and obtain arrest warrants for criminal trespass (J.A. 44, 52). The pickets then left the premises and did not return (J.A. 44, 143).

On these facts, the Board held that Hudgens violated Section 8(a)(1) of the Act by threatening to cause the arrest of Butler's picketing employees, and entered an order requiring it to cease and desist from such conduct in the future (A. 18, 39-40). The Board found that the employees were engaged in "activity coming directly within the ambit of Section 7, viz. an economic strike engaged in by employees against their own employer" (A. 18). The Board concluded that "their employer, whose store happens to be located within [Hudgens'] shopping mall, was not insulated from the picketing merely because someone else, [Hudgens], was the technical owner of the shopping mall and the land surrounding it" (A. 19). The Board stated (*ibid.*):

> [Hudgens'] property rights in the mall were not limited to its exclusive use. Indeed, to limit the mall to that use would have defeated its purpose and that of [Hudgens'] tenants whose businesses were open to the public, as well as their employees. Clearly, it was [Hudgens'] intent to permit use of the shopping mall to these classes of persons, and that thus Butler's employees were within the acceptable groups. That being the case, Butler's employees could not be designated as unacceptable and excluded from the mall solely because they chose to engage in protected concerted activity.[5]

[5]The Board added (A. 19):

> [W]e are of the view that our interpretation achieves a desirable accommodation between [Hudgens'] property rights and the employees' Section 7 rights by according employees the right to picket their employer at such a proximate location, directly in front of the employer's premises, rather than requiring them to picket at a more distant location which may well be a common situs for entrance to other places of business and thus invite secondary effects.

Upon review, the court of appeals enforced the Board's order (A. 1-15). The court concluded that this Court's decision in *Lloyd Corp.* v. *Tanner*, 407 U.S. 551, "although having its genesis in the constitutional issues" there raised, "isolates the factors relevant to determining when private property rights of a shopping center owner should be required to yield to the section 7 rights of labor picketers" (A. 10). Applying those factors here, the court held that the Section 7 rights of the picketing employees were entitled to prevail since the picketing was related to the normal functions of the shopping center and alternatives to the picketing were either unavailable or inadequate (A. 10-15).

ARGUMENT

The decision of the court of appeals is correct and there is no conflict of decisions. Accordingly, further review is not warranted.

1. Section 7 of the Act guarantees that employees may "engage in * * * concerted activities for the purpose of collective bargaining * * *," and Section 8(a)(1) prohibits employer interference with that right. Peaceful picketing by employees of their employer in support of lawful bargaining demands has long been recognized as a form of protected concerted activity. *United Steelworkers* v. *National Labor Relations Board (Carrier Corp.)*, 376 U.S. 492, 498-499; *International Longshoremen's Ass'n, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195, 200-201; *National Labor Relations Board* v. *United States Cold Storage Corp.*, 203 F.2d 924, 927 (C.A. 5), certiorari denied, 346 U.S. 818. However, when Section 7 rights conflict with an employer's property rights, it is necessary to balance the competing legitimate interests. See *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793; *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105; *Central Hardware Co.* v. *National Labor Relations Board*, 407 U.S. 539. The Board's decision, sustained by the court of appeals, reflects a reasonable accommodation of these competing interests in the circumstances of this case.

Thus, the shopping center here has all the attributes of a business district devoted to public use. It is a large tract, containing 60 retail stores, which Hudgens has opened to customers of the stores (who are drawn from the entire metropolitan Atlanta area), to employees of the stores, and to deliverymen. The warehouse employees of Butler, a lessee of one of the stores, in furtherance of a legitimate contract dispute with Butler, engaged in peaceful picketing immediately outside the mall entrances to their employer's store in the center. As the court of appeals correctly noted, "[t]he picketers' message to withhold patronage from the Butler store was directly related to Hudgens' invitation, although not specifically related to the operation of the particular Butler store" in the mall (A. 11). Moreover, alternative locations for picketing the Butler store were not acceptable, since they would present traffic hazards, obscure the pickets' message, and make it difficult to limit the effect of the picketing to the primary employer (A. 15). See *Amalgamated Food Employees Union, Local 590* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308, 321-322, 323. In these circumstances, to prohibit the picketing at the Butler store would substantially dilute the right which employees have traditionally enjoyed to picket their employer wherever he is located,[6] while, at the same time, it would vindicate little more than Hudgens' naked title interest in

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[6]See *Local 761, Electrical Workers* v. *National Labor Relations Board*, 366 U.S. 667, 672; *National Labor Relations Board* v. *Local 810, Steel, Metals, etc., Bros. of Team., etc.*, 460 F.2d 1 (C.A. 2).

the center. Indeed, such prohibition would, as the court of appeals noted (A. 11), immunize employers in shopping centers from " 'criticism (in many circumstances) by creating a *cordon sanitaire* * * * around their stores' " (quoting *Logan Valley, supra,* 391 U.S. at 325, cited with approval in *Lloyd, supra,* 407 U.S. at 562).

2. Contrary to petitioner's contention (Pet. 4-6), the decision below is not contrary to *Babcock & Wilcox* and *Central Hardware, supra.* In those cases, the Court held that, with respect to organizational activity by nonemployees on essentially private property, a proper accommodation between employee Section 7 organizational rights and the employer's property rights requires the latter to yield only when reasonable attempts by nonemployees to communicate with the employees through other available channels of communication are ineffective.[7] The present case, by contrast, involves peaceful picketing by employees in furtherance of a lawful strike against their employer, and it takes place in a large commercial shopping center, which has acquired many of the characteristics of the normal municipal "business block." A different accommodation between Section 7 rights and property rights is appropriate, we submit, in this situation.[8] Not only has the owner further diminished his property rights by opening the premises more widely to the public, but peaceful picketing in furtherance of a lawful strike, which enjoys a special

[7]Thus, in *Central Hardware, supra,* 407 U.S. at 544-545, the Court emphasized:

> The principle of *Babcock* is limited to this accommodation between organization rights and property rights. This principle requires a "yielding" of property rights only in the context of an organization campaign.

[8]Petitioner errs in contending (Pet. 5) that the Board stated that "the test now to be applied to the case at bar is that set out in *Babcock and Wilcox.*" The quotation is from the decision of the Administrative Law Judge (A. 31), whose rationale was not adopted by the Board (A. 18-19).

status under the Act (see Section 13, *supra,* p. 2),[9] is involved. Moreover, the intended audience of the picketing includes not only the store's employees, but its potential customers, who cannot easily be identified until they approach the store. "This contrasts," as the court of appeals observed (A. 12), "with organizational campaigns in which the audience solicited is composed of employees of a particular employer, a limited usually identifiable group, which often can be reached very effectively by means other than personal contact on the employer's private property."

In the situation here, it was proper, in making the accommodation between Section 7 rights and property rights for the Board and the court to look to the factors which the Court deemed relevant in *Logan Valley* and *Lloyd, supra*—*i.e.*, whether the activity is directly related to the use to which the shopping center is being put, and whether other reasonable opportunities for conveying the message to the intended audience are available.[10] Those cases, like the present case, involved consumer appeals at a large, privately owned shopping center, which was the equivalent of a municipal "business block." In *Logan Valley*, a union,

[9]See also *National Labor Relations Board* v. *Drivers, Local Union No. 639,* 362 U.S. 274, 281-282.

[10]To be sure, the Court, in *Central Hardware, supra,* concluded that the Board had erred in relying on *Logan Valley* because that decision "rests on constitutional grounds; it is not a §7 case" (407 U.S. at 545). However, it does not follow, as petitioner contends (Pet. 5), that the Court thereby intended to preclude the Board, in defining the scope of Section 7 rights under the National Labor Relations Act, from utilizing the *Logan Valley* factors in other factual settings where they would be appropriate.

seeking to organize the employees of one of the stores in the center, attempted, by picketing in front of the store, to induce customers not to patronize it; in *Lloyd,* a group protesting the Viet Nam War, sought, by handing out leaflets in the center, to obtain public support for their cause. The Court upheld a right of access in *Logan Valley,* but denied it in *Lloyd.* The difference between the two results, the Court explained in *Lloyd* (407 U.S. at 563-564), is that, in the former case, the picketing was " 'directly related in its purpose to the use to which the shopping center property was being put' " and "no other reasonable opportunities for the pickets to convey their message to their audience were available"; in the latter case, neither of these elements was present. As shown (*supra,* p. 3), here, as in *Logan Valley,* the picketing was directly related to the use of the shopping center and no other reasonable opportunities for reaching the pickets' audience were available.[11]

3. The decision below does not conflict with *National Labor Relations Board* v. *Visceglia, t/a Peddie Buildings,* 498 F.2d 43 (C.A. 3) (Pet. 6-7). As the court below correctly concluded (A. 15, n. 14), that case is "clearly distinguishable." *Peddie* involved picketing at an industrial park,

[11]There is no merit to petitioner's contention (Pet. 7-8) that, since the labor dispute did not involve Butler's mall store, the activity here was only indirectly related to the purpose of the mall. As the court below properly concluded (A. 11), under *Logan Valley* and *Lloyd,* "[t]he appropriate focus is on the message sought to be conveyed and its intended audience, not * * * on whether the labor dispute in fact was precipitated by something involving the operation of one particular store in the shopping center." Since "[p]otential customers of Butler's North DeKalb store comprised a group within the scope of the broad invitation issued by Hudgens to the public to come and shop at center stores," the "picketers' message to withhold patronage from the Butler store was directly related to Hudgens' invitation" (*ibid.*).

which was less open to the public than was the shopping center here (see 498 F.2d at 45-46). Moreover, the court in *Peddie* found that there was "no evidence" that the pickets could not have effectively communicated their "message to the appropriate people" at the entrance to the park (*id.* at 49).[12]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[12]Indeed, the court in *Peddie* specifically stated that "we do not believe that the instant record requires us to reach [the] difficult problem" of "whether *Logan Valley* applies to pickets (labor or otherwise) in industrial parks" (498 F.2d at 45, n. 3).